

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM HARRIS,)	
)	
Plaintiff,)	Civil Action No. 05-279
)	
v.)	Judge Terrence F. McVerry/
)	Magistrate Judge Lisa Pupo Lenihan
Dr. MICHAEL JOSEPH HERBIK, ROBERT)	
TRETNIK, R.N, CHCA, NEAL MECHLING,)	
Superintendent, CAROL SCIRE, Superintendent)	
Assistant, DARLENE LINDERMAN, Mailroom)	
Supervisor, CHARLES MARTIN, Security)	
Lieutenant, and LINDA D. HARRIS, Deputy)	
Superintendent,)	
)	
Defendants)	

MEMORANDUM ORDER

An *in forma pauperis* application in the above-captioned prisoner civil rights case was received by the Clerk of Court on March 3, 2005, and was referred to United States Magistrate Judge Lisa Pupo Lenihan for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation (Doc. No. 41), filed on November 2, 2006, recommended that the Defendant Herbik's motion to dismiss and motion for more definite statement be denied and that pursuant to the Prison Litigation Reform Act, Plaintiff's Fourteenth Amendment substantive and procedural due process claims, as well as his Fifth Amendment claims, be dismissed. Service was made on the Plaintiff via First Class mail at SCI-Somerset, 1600 Walters Mill Road, Somerset, PA, 15510 which was the address of record for Plaintiff. Service was made on Defendant Herbik's counsel and the Attorney General's office

electronically. The parties were informed that in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, that he had ten (10) days to file any objections. Defendant Herbik's counsel filed objections on November 14, 2006. Doc. 43.

Only one of those objections bears mention. Defendant Herbik's counsel makes much of the fact that the original complaint in this case was lost and consequently, he cannot raise what he views to be a potential meritorious statute of limitations defense. If Defendant Herbik really had wished to pursue this matter in connection with his Rule 12(b)(5) & (6) motion, he could simply have made a motion requesting an evidentiary hearing be conducted concerning what claims were included in the original complaint and the issues could have been resolved finally with the court making findings of fact with respect to what claims against Defendant Herbik were included in the original complaint. See Fed.R.Civ.P. 12(d) (providing for preliminary hearing on motions raised pursuant to Rule 12(b)). However, he has thus far failed to do so, and now at this point in the proceedings, he has waived such a request given that his motion is being disposed of now. See, e.g., North Bridge Associates, Inc. v. Boldt, 274 F.3d 38, 44-45 (1st Cir. 2001) ("It does not appear from the record, however, that appellants sought a hearing under . . . Fed.R.Civ.P. 12(d), which provides for preliminary hearings 'on application of any party' It can hardly be error for the court to withhold an opportunity appellants did not request"). In the absence of a request for a hearing, the report's resolution of the issues was eminently reasonable. Moreover, at this point, it may be just as efficient for all concerned if the case simply proceeds to summary judgment on the merits.

After *de novo* review of the pleadings and the documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 13th day of December, 2006;

IT IS HEREBY ORDERED that Defendant Herbik's motion to dismiss and motion for more definite statement be **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Fourteenth Amendment's substantive and procedural due process claims as well as his Fifth Amendment claims be dismissed pursuant to the PLRA for failure to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that the Report and Recommendation (Doc. No. 41), filed on November 2, 2006, by Magistrate Judge Lenihan, is adopted as the opinion of the court.

BY THE COURT:

s/ Terrence F. McVerry
United States District Judge

cc: Honorable Lisa Pupo Lenihan
United States Magistrate Judge

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